IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 12, 2006 at Jackson

DAINMUS T. HUDSON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Robertson County
No. 03-0349 Michael R. Jones, Judge

No. M2005-02628-CCA-R3-PC - Filed December 14, 2006

The petitioner, Dainmus T. Hudson, pleaded guilty in Robertson County Circuit Court to two counts of delivering under 0.5 grams of cocaine in a school zone. He sought post conviction relief, claiming ineffective assistance of counsel and that his plea was involuntary. The court denied his petition, and the petitioner appealed. Because we discern no error in the post-conviction court's proceedings and because the record supports that court's determinations, we affirm.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

William Kroeger, Springfield, Tennessee, for the Appellant, Dainmus T. Hudson.

Michael E. Moore, Acting Attorney General & Reporter; David H. Findley, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Dent Morriss, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In this appeal, the petitioner claims that the post-conviction court erred in holding that his guilty pleas were knowing and voluntary.

Pursuant to the petitioner's guilty pleas, the Robertson County Circuit Court entered judgments on March 4, 2004, convicting the petitioner of, and sentencing him for, two counts of delivering under 0.5 grams of cocaine, a schedule II controlled substance, within 1000 feet of a school. *See* T.C.A. § 39-17-417(a)(2) (2003) ("It is an offense for a defendant to knowingly . . . [d]eliver a controlled substance."); *id*. § 39-17-408(b)(4) (defining cocaine as a Schedule II controlled substance). He received two eight-year sentences to be served at 100 percent in the Department of Correction, running concurrently with each other and with a Davidson County case and a Robertson County aggravated perjury case. The trial court entered the judgments on March

4, 2004,[1] and the petitioner filed a timely petition for post-conviction relief now under review. Once the post-conviction court appointed counsel, counsel amended the petition, and the petitioner claimed that trial counsel was ineffective and that his guilty pleas were involuntary or unknowing.[2] The post-conviction court conducted an evidentiary hearing and afterward entered its written findings of fact, conclusions of law, and adjudication of denial of relief.

In the evidentiary hearing, the petitioner testified that he pleaded guilty to the two drug charges, the subject of this post-conviction review, and an aggravated perjury charge. He agreed to an effective eight-year sentence at 100 percent in the Department of Correction. He testified that trial counsel informed him that he could possibly receive a 16-year sentence.

The petitioner testified that trial counsel only met with him twice, and during these meetings, they did not discuss the elements of the offenses charged, the State's evidence, or a possible defense. At the first meeting, the petitioner testified that trial counsel presented the State's offer of eight years to serve in the Department of Correction at 85 percent. The petitioner rejected this offer and told trial counsel that he wanted to go to trial.

The petitioner alleged many deficiencies with trial counsel's representation. He claimed that he would tell trial counsel about "a situation to look at and to check out," but when trial counsel would speak with him again, "[trial counsel] had forgot[ten] everything [the petitioner] had told him to check into." He testified that trial counsel failed to fully investigate the case, to file pretrial and discovery motions, and to file for a forensic evaluation because of petitioner's mental health issues. The petitioner further testified that trial counsel did, however, play for him the drug transaction audiotape recorded via a transmitter worn by the confidential informant involved in the transaction. The petitioner denied delivering drugs, and he further asserted that his voice was not recorded on the audiotape. The petitioner testified that trial counsel did not seek to have an expert examine these audiotapes, and he complained that trial counsel waited until the morning of trial

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[1]Both judgment forms list that the petitioner pleaded guilty to the drug charges, docket number 03-0349. However, on the second page of the Petition for Waiver of Trial by Jury and Request for Acceptance of Plea of Guilty, handwritten lines cross through "Guilty", and "No Contest" is written below. The guilty plea hearing transcript, attached to the post-conviction hearing transcript as exhibit two, confirms that the petitioner pleaded guilty to counts two and four of case 03-0349 and *nolo contendere* to the aggravated perjury charge in case number 03-0304.

For purposes of analysis on this collateral attack, we are not concerned with the nature of the plea because whether the plea is denominated a guilty plea, a *nolo contendere* plea, or an *Alford* plea, constitutional considerations mandate that the plea be voluntarily, understandingly, and knowingly entered. *See Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1713 (1969); *State v. Neal*, 810 S.W.2d 131, 134-35 (Tenn. 1991), *overruled on other grounds by Blankenship v. State*, 858 S.W.2d 897, 902 (Tenn. 1993).

[2]The post-conviction petition only addresses the drug charges, docket number 03-0349. It does not challenge the aggravated perjury guilty plea. Again, the petition alleges that trial counsel was ineffective and that his guilty pleas were involuntary, and the post-conviction court ruled on these issues. Petitioner's brief on appeal, however, raises only one issue for review: "Whether the trial court erred when it determined that the Appellant[']s guilty pleas were entered knowingly, understandingly, and voluntarily."

before showing him the State's map of the school and the surrounding area, including the address where the petitioner delivered the cocaine.

The petitioner stated that at the second meeting, which took place on the eve of trial, trial counsel presented the settlement offer previously discussed and told the petitioner that he had not prepared a defense. The petitioner rejected the offer, and at that point, he told trial counsel "in a calm voice, no profanity or nothing" that he wanted to hire "[his] own counsel." The petitioner further testified that after the meeting ended, trial counsel told a lieutenant that the petitioner had threatened him. The petitioner testified that "[trial counsel] caused me to be put in the hole, which I couldn't call my people that night."

The petitioner also testified that on the morning of trial, he told the trial court that he wanted to hire other counsel. He testified that other counsel would communicate better with him and prepare a defense. The petitioner further testified that the trial court stated that his case was set for trial that day, and if he wanted to hire other counsel, then the other counsel must be present to try the case. The petitioner explained that he could not get counsel there to try the case that day because no other attorney had reviewed his case. The petitioner testified that when the trial court denied his motion to continue, he was thinking, "I'm fixing to get railroad[ed]." After the continuance denial, he told his mother that he would accept the State's offer "because [trial counsel] ain't trying to – he ain't trying to help me."

The petitioner testified that trial counsel told him that if he did not take the deal and went to trial, then the State would try him and his brother, who was incarcerated at the time on other charges, together and that the State would remove his cousin's daughter from her custody because she lived or was present at the address where the petitioner delivered the cocaine. Furthermore, the petitioner testified that trial counsel told him that the State would dismiss the aggravated perjury charge if he pleaded guilty.

The petitioner testified that he ultimately pleaded guilty "[b]ecause [he] felt like [he] was backed into a corner, because [trial counsel] told – [trial counsel] told [him] out of his mouth that he didn't have no defense, so why go to trial with no defense and let the State give [him] more time?" He asserted that he answered "yes" to everything the trial court asked him at the guilty plea hearing because trial counsel instructed him to do so.

On cross-examination, the petitioner testified that the situations he told trial counsel to investigate were whether he delivered the drugs and whether the delivery occurred within 1000 feet of the school. He reiterated that trial counsel lied to him and lied to the petitioner's family regarding the number of times he visited the petitioner in jail. The petitioner further testified that he had never been hospitalized for drug or alcohol abuse or for any mental disorder or suicidal behavior.

The petitioner admitted that he contacted two different attorneys regarding his case from the time of his arraignment until his March 4, 2004 trial date. He failed to remember their

names. In addition, he testified that he did not know the name of the attorney whom his mother allegedly hired and who was supposedly on call the morning of trial.

Also on cross-examination, the petitioner testified regarding the trial court's questions at the guilty plea hearing, and he stated, "I didn't pay it no attention. . . . [Trial counsel] just said say yes to everything, so I just got up there and said yes to everything." The petitioner offered that he answered "no" when the trial court asked him if he had sufficient time to decide whether to plead. When questioned, he also admitted that he answered "no" to the question regarding whether he had any questions and to the question regarding whether he had difficulty understanding anything. When asked why he answered "no" to questions instead of saying "yes" to everything as instructed, the petitioner replied, "Now, I'm not – you know, I'm not dumb."

The State presented two witnesses, the investigating officer and trial counsel. City of Springfield Officer Charles Bogle testified that on May 21, 2003, he gave the confidential informant the money to buy the cocaine and equipped him with a body transmitter. He testified that the transaction took place on Elmwood Drive because "[he] observed [the confidential informant] on that road prior to the deal taking place." Officer Bogle testified that he listened to the transaction via the transmitter about a block away at Elmwood Cemetery. He also testified that he was involved with the transaction on May 30, 2003. Officer Bogle testified that the May 30 transaction took place at the same address on Elmwood Drive, the same confidential informant was involved, and he recorded this transaction via the same body transmitter. On this occasion, Officer Bogle waited in the vicinity at Rains Drive.

Officer Bogle testified that, according to a map prepared by the City of Springfield's Engineering Department, the Elmwood Drive address where the transaction occurred was well within 1000 feet of Bransford Elementary School. He further testified that the petitioner was the target of both investigations.

Trial counsel testified that the trial court appointed him to represent the petitioner in this matter. At the time of appointment, he was already representing the petitioner on an aggravated assault charge and an aggravated perjury charge. He had previously represented the defendant on an evading arrest charge and a violation of probation matter. Trial counsel testified that because he represented the petitioner in numerous cases, he probably visited the petitioner in jail approximately five or six times. He visited the petitioner approximately three or four times regarding the drug charges alone. Trial counsel remembered visits in order to discuss the State's settlement offer, to listen to the police audiotape of the drug transaction, and to meet on the eve of trial.

Trial counsel testified that during his meetings with the petitioner, he discussed the charges, although he did not specifically say "elements of proof." He informed the petitioner that the drug charges were Class B felonies for which he could receive eight to 12 years for each offense. These sentences could be served consecutively or concurrently, and because they were committed within 1000 feet of a school, they would have to be served "day for day." Trial counsel also informed the petitioner that in addition to the drug charges, he had an unresolved aggravated assault

charge, an aggravated perjury charge, and a violation of probation charge in Davidson County. Trial counsel warned the petitioner that considering all of the pending charges, "he was looking at a theoretical maximum of over 30 years in the Department of Correction[]."

Responding to petitioner's claim that trial counsel lied to him on several occasions, trial counsel testified that he did not tell the petitioner that he and his brother would be tried together if he rejected the settlement offer. Furthermore, trial counsel explained that the State was investigating the "Hudson family," and during one of his meetings with the State, the State mentioned a female relative at the Elmwood address. Trial counsel argued that the petitioner may only be charged with facilitation if he was delivering the cocaine for someone else inside the house on Elmwood. Trial counsel testified that the State mentioned if the female went to the penitentiary, then she would lose custody of her child. Trial counsel further testified that to the best of his knowledge, the State did not investigate the female relative any further.

Relating to trial counsel's investigation, he testified that he drove to the scene and went to the city's Engineering Department to inquire as to how the map of the scene was made. He then cross-checked the city's map with his global positioning system. Trial counsel determined that the map was accurate and testified, "There was no doubt that the jury would have found that any transaction occurred within a thousand feet of a school." In addition, trial counsel checked the wireless transmitter and stated that a confidential informant could be no more than one to two blocks away from an officer, or the transmission would fail. Furthermore, trial counsel interviewed the confidential informant and found him "honest," and he searched the confidential informant's criminal history. Trial counsel found no prior felony convictions and no misdemeanor convictions that involved dishonesty. He explained that the confidential informant would testify "unimpeached," and the petitioner would exercise his right not to testify because of two prior felony convictions.

Regarding pretrial and discovery motions, trial counsel testified that the Public Defender's Office filed a standing motion to receive discovery from the Attorney General's Office. In addition, trial counsel testified that he had no basis to file a motion to suppress. Furthermore, trial counsel testified that the petitioner failed to exhibit indications of mental illness, "nothing that would amount to a defense against any criminal charges."

Trial counsel further testified that he met with petitioner on the eve of trial. He testified that the petitioner raised his voice and told trial counsel that he had hired another lawyer who would be at trial the next day. The petitioner never mentioned the hired lawyer's name, but he did state that he was not going to trial. As a result of petitioner's demeanor in this meeting, trial counsel testified that he worried the petitioner would "act up" in the courtroom. Therefore, he told the lieutenant that extra security was needed in the courtroom and not that the petitioner threatened him.

Trial counsel testified that on the morning of trial after the petitioner decided to plead guilty, he personally prepared the Petition for Waiver of Trial by Jury and Request for Acceptance of Plea of Guilty and discussed its contents with the petitioner. He testified that he did not tell the

petitioner to answer yes to every question asked by the trial court and that as a result of the guilty pleas, the petitioner received the minimum sentences.

On cross-examination, trial counsel testified that on the eve of trial, the petitioner rejected the settlement offer and requested to go to trial. He testified that after this meeting that his relationship with the petitioner became strained although it was not "damaged to where [he] could not properly represent [the petitioner]."

Trial counsel further testified that on the morning of trial, the petitioner's mother informed the trial court that she had hired other counsel who was on call. She requested a continuance on hired counsel's behalf. Trial counsel testified that the trial court stated that hired counsel could try the case, but the case had to be tried that day. Trial counsel admitted that this was the first trial setting.

Subsequent to the evidentiary hearing, the post-conviction court entered an order expressing its findings of fact and conclusions of law and denying post-conviction relief. The post-conviction court found that trial counsel interviewed the confidential informant, researched the 1000-feet range on the city's map, and communicated adequately with the petitioner. Furthermore, trial counsel did file for discovery via the standing motion. The court also found that the petitioner failed to prove that exculpatory evidence existed, that trial counsel should have conducted further investigations, that pretrial motions should have been filed, that any statements by the petitioner or anyone else should have been suppressed, and that trial counsel rendered erroneous legal advise. Essentially, the court determined that there was no evidence that trial counsel's services were deficient.

The post-conviction court also found that no attorney contacted trial counsel informing him that he or she had been hired, and no attorney testified that he or she had been hired by the petitioner's mother. The court found that the petitioner requested to change attorneys "too late." Furthermore, trial counsel was prepared to try the case on the morning it was set for trial; therefore, the court held that the petitioner was not deprived of his right to an attorney.

The post-conviction court further found that the petitioner's medical report showed that the petitioner suffered from anxiety attacks, but he failed to prove any mental disorders. The court found that the petitioner scored in the low to average range on an I-Q test and that he scored no higher than a sixth-grade level on other administered tests. However, the petitioner presented no evidence that he did not fully understand the consequences of his pleas, and no evidence showed that his pleas were coerced.

A post-conviction petitioner bears the burden of establishing, at the evidentiary hearing, his allegations by clear and convincing evidence. T.C.A. § 40-30-110(f) (2003). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992). An appellate court is bound by the trial court's findings of fact unless it concludes that the

evidence in the record preponderates against those findings. *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

The petitioner claims that his pleas were coerced, therefore, not voluntarily and knowingly made because he was denied counsel of his own choice, because trial counsel was deficient, and because trial counsel misinformed him regarding the case. Certainly, when a defendant opts to plead guilty, the plea must be voluntarily, understandingly, and knowingly entered to pass constitutional muster. *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S. Ct. 1709, 1713 (1969). In Tennessee, a plea must be made voluntarily and with full understanding of its consequences. *State v. Neal*, 810 S.W.2d 131, 134-35 (Tenn. 1991), *overruled in part on other grounds by Blankenship v. State*, 858 S.W.2d 897 (Tenn. 1993); *State ex rel. Barnes v. Henderson*, 220 Tenn. 719, 727, 423 S.W.2d 497, 501 (1968). Entry of a guilty plea constitutes a waiver of constitutional rights including the privilege against self-incrimination, the right to confront witnesses, and the right to a trial by jury. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1714. Waiver of these constitutional rights may not be presumed from a silent record. *Id.*; *Hicks*, 983 S.W.2d at 246.

In determining whether a plea of guilty was voluntarily, understandingly, and intelligently entered, this court, like the trial court, must consider all of the relevant circumstances that existed at the entry of the plea. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). A reviewing court may look to any relevant evidence in the record to determine the voluntariness of the plea. *Id.*

A plea is involuntary if the accused is incompetent or only "if it is the product of 'ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Boykin*, 395 U.S. at 242-43, 89 S. Ct. at 1712). A defendant's testimony at a plea hearing that his or her plea is voluntary is a "formidable barrier in any subsequent collateral proceedings" because "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977).

In the present case, trial counsel met with the petitioner and discussed the charges and the petitioner's options. He fully informed the petitioner of the possible sentence he could receive, considering all of his pending charges and violations, if he chose to go to trial. On the day of trial, trial counsel was present in the courtroom, prepared to go forward, and willing to try the case if the petitioner so decided. Although the petitioner's mother represented to the trial court that she had hired other counsel, other counsel was not present, much less prepared to try the case.[3] No counsel contacted trial counsel to inform him of his or her retention, and neither the petitioner nor his mother informed the court of counsel's name. Furthermore, trial counsel reviewed the State's settlement offer with the petitioner, and the petitioner decided to plead guilty. Even though the petitioner stated that he did not have sufficient time to decide whether to plead, he chose to plead instead of going

[3]According to the guilty plea hearing transcript the trial court even recessed to allow the petitioner's mother to contact hired counsel in order to give counsel the opportunity to be present on behalf of his or her client.

to trial. Again, trial counsel was prepared to defend him on the day of trial if he so decided. Based on the post-conviction court's findings and the record, we hold that the petitioner has failed to establish that his pleas were involuntary.

Accordingly, the judgment of the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE